

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ASHLEY SMITH-BAER,
BRITTNEY SMITH-BAER, SKYLYNN SMITH,
and HUNTER COMSTOCK, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MELISSA SMITH,

Respondent-Appellant,

and

SCOTT SMITH and MATTHEW COMSTOCK,

Respondents.

UNPUBLISHED
February 10, 2004

No. 249459
Kent Circuit Court
Family Division
LC No. 01-107800-NA

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Respondent¹ appeals by right from the trial court's order terminating her parental rights to her minor children under MCL 712A.19b(3)(c)(i) and (g). We affirm.

Respondent first argues that she was denied the effective assistance of counsel. The principles of effective assistance of counsel developed in criminal law apply by analogy to termination proceedings. To prevail on a claim of ineffective assistance of counsel, respondent must show that her attorney's performance was deficient, that it fell below an objective standard of reasonableness, and the representation so prejudiced her that it denied her a fair trial. This

¹ Because only the children's mother has appealed, "respondent" refers to appellant.

requires that she show that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). Because respondent failed to seek an evidentiary hearing below or move for a new trial based on ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

The record discloses that respondent's attorney made some errors, such as failing to bring respondent's pay stubs for evidence. These errors were not outcome determinative, however. Moreover, respondent's attorney vigorously cross-examined witnesses and often gained admissions favorable to respondent. He produced several witnesses for respondent who testified on the challenged matters. He made an able closing argument. His performance did not fall below an objective standard of reasonableness and respondent was not denied the effective assistance of counsel.

Next, respondent argues that the trial court erred because a statutory basis to terminate her parental rights did not exist. Further, respondent argues that it was not in the children's best interest to terminate her parental rights. To terminate parental rights, the court must find by clear and convincing evidence that at least one ground for termination listed in MCL 712A.19b(3) exists. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1993). This Court reviews "for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 353, 356-357; 612 NW2d 407 (2000). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a firm and definite conviction a mistake was made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). When we review the trial court's factual findings for clear error, we must accord due deference to the special opportunity of the trial court to assess the credibility of the witnesses who appeared before it. MCR 2.613(C).

We agree with our Supreme Court that "[t]he deference required by MCR 2.613(C) can make a critical difference in difficult cases such as the one before us." *Miller, supra* at 337. The trial court had before it the record before the petition to terminate parental rights and heard the testimony of a psychiatrist and psychologist regarding respondent's mood disorder at the termination hearing. Petitioner also presented the testimony of an expert in substance abuse treatment and respondent's caseworker, which supported termination. The trial court justified its finding of statutory bases for the terminations in a detailed, lengthy, written opinion. We are not left with a firm and definite conviction a mistake was made. *Miller, supra* at 337.

Because a statutory ground for termination was established by clear and convincing evidence, the trial court was required to terminate respondent's parental rights "unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." MCL 712A.19b(5). The statute mandated that the trial court terminate respondent's parental rights "unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo, supra* at 354. Here, the trial court went beyond the statutory requirement and found that it was in the children's best interest to terminate respondent's parental rights. *Id.* at 357.

Based on our review of the record, we find no clear error in the trial court's determination concerning the best interests of the children. *Id.* at 356-357.

We affirm.

/s/ Christopher M. Murray

/s/ William B. Murphy

/s/ Jane E. Markey